

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 11, 2007 Session

HERSCHEL DOWDELL v. JAMES L. COTHAM, ET AL.

**Appeal from the Chancery Court for Robertson County
No. 18298 Laurence M. McMillan, Jr., Chancellor**

M2006-00750-COA-R3-CV - Filed on July 25, 2007

Herschel Dowdell filed an action to quiet title to his property based on a boundary line dispute with James and Betty Cotham, adjoining neighbors for over twenty years. The boundary dispute arose following a survey commissioned by Dowdell to determine the precise boundary of the two properties when Dowdell decided to place his property on the market for sale. The Cothams challenged the surveyor's findings and countersued Dowdell claiming adverse possession. Dowdell then amended his complaint to add the tort of defamation of title. Following a bench trial, the Chancery Court concluded that the evidence failed to support the adverse possession and defamation of title claims. The Court designated the adjoining ditch line as the natural boundary line. Dowdell brings this appeal claiming, among other things, that the trial court erred in denying the claim of defamation of title and erred in arbitrarily finding the boundary line to be the center of the adjoining ditch line. Following our review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Chancery Court is Affirmed**

J. S. (STEVE) DANIEL, Sr. J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, Jr., and JJ., joined.

Stephen E. Grauberger, Goodlettsville, Tennessee, for Appellant, Herschel Dowdell.

Lee Borthick, Jr., Springfield, Tennessee, for Appellees, James L. Cotham and Betty J. Cotham.

OPINION

Factual and Procedural History

The appellant, Herschel Dowdell, and appellees, James L. Cotham and Betty J. Cotham are owners of adjoining real property located at 2948 Distillery Road, Greenbriar, Tennessee and at 2936 Distillery Road, Greenbriar, Tennessee, respectively. Mr. Dowdell purchased his property in June 1985 and the Cothams purchased their property in 1983 and both have continuously owned their respective properties since that time.

According to the testimony at the bench trial, neither Mr. Dowdell nor the Cothams knew the precise boundary line of their adjoining properties. Further, the topic, though mentioned by the parties sporadically throughout the years, was never fully discussed and no resolution was ever sought. When Mr. Dowdell prepared his property for sale in late 2003 and early 2004, the issue rose to the forefront.

Mr. Dowdell hired registered land surveyor, Mike Burns, to conduct a survey of his property in an attempt to resolve the dispute. Burns testified as an expert at the bench trial but explained that the actual field work had been completed by his associates. Burns said the surveyors easily identified two corners or pins of Mr. Dowdell's property and a third corner which was adjoining Mr. Dowdell's neighbor to the North. Burns added that these three points were sufficient for him to conduct a survey. He admitted, however, that the line between the Cotham and Dowdell properties was not as certain.

Burns explained that it was common practice when surveying not only to pull deeds from the subject property owner but to pull the deeds to properties surrounding the subject property. When he determined that the Dowdell tract was once part of a larger parcel now lying across the road from Dowdell, Burns used this old line to determine the coordinates of his final boundary line between Dowdell and Cotham.

On cross-examination, Burns stated that he had been retained by Dowdell to conduct a survey of the property because Dowdell wanted to know the location of his property line. Dowdell told Burns that the Cothams believed their property line went all the way to Dowdell's driveway. Burns recalled the Cothams' deed contained a call measuring 54.6 poles along the road which equaled 900.9 feet of road frontage for the Cothams. However, Burns believed the Cothams' deed was a "bust", meaning that the survey line would not close. He said if you read the calls on the Cotham deed literally, it would take approximately 972 feet to close. Burns said he did not know if any of his surveying team walked the road frontage of the property.

On the drawings presented as trial exhibits, 900.9 feet of roadway frontage for the Cothams resulted in an overlap or encroachment upon Mr. Dowdell's property line (as found by Burns) by 68.62 feet. Burns said he never measured the road frontage based on the Cothams' deed. He admitted that one of his associates could have done such a measurement thereby resulting in the 68.62 overlap shown in the sketches. However, he denied any overlap in the two property lines according to his survey findings. Burns admitted that his results were based in

part on calculations (based on the deed) done by the computer. In conclusion, Burns held firm to his testimony that his survey accurately reflects the boundary of Mr. Dowdell's property.

Herschel Dowdell testified that he is the owner of the real property located at 2948 Distillery Road and has owned the property since July 1985. He said at the time of purchase he had no knowledge of the boundary lines. Mr. Dowdell said he walked the property and found two of his corners and eventually decided the northern boundary pin of a neighbor marked a third corner. However, he had not located a distinct closing point for the property along the border with the Cothams.

Mr. Dowdell described a drainage ravine, brush timber area and fence between his property and the Cothams. Mr. Dowdell said he first had a discussion with the Cothams about the boundary line in December 2003 and into January 2004 when he decided to put his property on the market. However, he did recall "over-the-fence" conversations with Betty Cotham some twenty years prior in which she told Mr. Dowdell she felt their property line actually went over near Mr. Dowdell's driveway.

According to Mr. Dowdell, he listed his property for sale in mid-2004. Just prior to listing, he and Betty Cotham had another "over-the fence" discussion about the location of the line. Mr. Dowdell said the Cothams told him they would try to determine the location of the line so that any future buyer would know its location. Even though Mr. Dowdell described the preliminary discussions with the Cothams as somewhat amicable, the tensions escalated near the time when Mr. Dowdell actually placed his property on the market.

Mr. Dowdell described a large sign erected by the Cothams near the disputed area. The signs included some of the following phrases: "No Sale," "Property Line Dispute," "We only want what is ours," and "This is not the correct property line." When the first sign was removed by someone in the middle of the night, the Cothams erected a second sign. The second sign contained various statements including: "Sign #1 Ripped Down During the Night, Sign #2 Keep Private Property," "Tried 3 times to Settle this to no Avail," and "Our Deed calls for 900.90 ft of Road Frontage Not 838'." The second sign also contained a comment that someone was "watching."

Mr. Dowdell said he saw people drive by his home and read the signs. He added that even though several people came to look at his house, no offers were made. He believed the sign adversely affected his ability to sell his home by driving potential buyers away. Mr. Dowdell said the dispute also affected him personally resulting in lost sleep, anger and fear. He felt the signs erected by the Cothams were threatening.

When asked about the maintenance of the ditch line between the properties, Mr. Dowdell explained that he had done some clean-up work in the ditch and had mowed nearby. He also testified that the Cothams had cleaned up the area on occasion. He added that the Cothams had never done anything to exclude him from the disputed area.

On cross-examination, Mr. Dowdell said he did not have a survey performed when he purchased the property and that no one showed him the boundary lines at that time. He admitted that he had never claimed property south of the ditch line until the Burns survey placed the boundary marker at the corner. However, he explained that he had never had a reason to identify the corner as being his property. Mr. Dowdell testified that he and the Cothams never had a problem until after the Burns survey.

When questioned about various discovery responses, Mr. Dowdell agreed that he had witnessed the Cothams clearing the ditch line on occasion including the removal of an old fence but did not try to stop them. He later testified that the remnants of the old fence that had grown into the tree were not on the Burns survey boundary line. Mr. Dowdell admitted that he called the police when the Cothams mowed in the disputed area after the Burns survey but did so because he felt threatened. This was the first time he had tried to exclude the Cothams from his property.

Betty Cotham testified that she is the owner of the real property located at 2926 Distillery Road. She said she first learned of Mr. Dowdell's intent to sell his property in May 2004. Mrs. Cotham saw Burns' survey crew on the property and engaged in conversation with one or more of them. She asked the crew why they were digging next to her fence. It was when the survey stake marked the boundary line determined by Burns that the Cothams erected the signs at the corner of the property.

During her testimony, Mrs. Cotham confirmed the content of the signs. She said when the first sign was torn down they put up the second sign. Mrs. Cotham explained that the signs were to let others know the property they believed they had owned for over twenty years was not for sale. She said the reference on the sign to "someone watching" simply meant they know the first sign was torn down and that they would be watching their property.

Through the years Mrs. Cotham said she did not know the precise location of the boundary line but believed it to be close to Mr. Dowdell's driveway. She added that she owned no less than the property alongside the ditch line but per her deed possibly owned even further onto Mr. Dowdell's property. At some point she measured the distance from a stone on her property, which Mrs. Cotham claimed was a property corner marker, to a mark 901.0 feet away. She said this measurement was based on the call in her deed.

Mrs. Cotham explained that after the property was listed she and her husband met with Mr. Dowdell at Dowdell's request to discuss the boundary line issue. Mrs. Cotham said she informed Mr. Dowdell where she believed the line to be according to her deed.

When asked about her adverse possession claim, Mrs. Cotham said she and her husband had cleared brush from the ditch line since 1983, including the removal of dead trees and an old fence that ran alongside the ditch. They usually did a "major" cleanup every two years. She said they never took any action to exclude Mr. Dowdell from the property but never believed she had an obligation to do so because of their belief they owned the property. She added that she had

never seen Mr. Dowdell on the disputed area doing maintenance work and had never found a need to exclude anyone from the property.

Mrs. Cotham was asked specifically about the old fence that ran along the ditch line between the two properties. She recalled that they removed the fence two to three years after they purchased the property in 1983.

On cross-examination, Mrs. Cotham affirmed that even though she did not know the exact location of the boundary line, she always believed it to be north of the ditch line due to her deed references. She said someone from Burns' team measured the road frontage and told her there was an overlap of fifty feet.

Again addressing the old fence she removed from the ditch line, she described the location of the fence and explained that it had been removed, among other reasons, to protect their cattle from getting trapped under it. She and her husband erected a new fence on the south side of the ditch line. Mrs. Cotham explained this new fence was never intended to be a boundary fence.

Ammon Halsey testified that he previously owned the land now owned by the Cothams and had lived in that community since 1960. He said he had personal knowledge of the property line between the Cothams and Dowdell. Halsey said the property had been deeded to him from Lewis Elmore, who had reared Mr. Halsey's wife. Halsey said at the time of the deed, Mr. Elmore showed him the boundaries of the property. According to Halsey, Lewis Elmore owned both the Dowdell and Cotham properties in the chain of title. Lewis Elmore then conveyed part of the property (southern portion) to Halsey and the other part (northern portion) to Richard Elmore. The Cotham property is the property previously owned by Mr. Halsey while the property now owned by Mr. Dowdell was part of the property owned by Richard Elmore. He said that when Lewis Elmore split the property, he showed Halsey the property line.

Halsey stated that Lewis Elmore indicated the boundary line between the two properties was "straight down a fence line all the way through the creek." He explained that the fence was in the crooked gully, "in and out of the north side and the south side, in and out." Halsey said during his ownership he never had a dispute about the boundary line.

Halsey could not recall whether he showed the Cothams the location of the boundary line when they bought the property. He reiterated his belief that the property line was "right down the gully" along the old fence which had been removed. Halsey explained the location of the old fence and said remnants of the old fence remain where it had grown onto the trees. He testified that Mr. Cotham removed the fence and moved the fence over further onto Cothams' property. Halsey said he told Mr. Cotham he should have put the fence back at the right place because he believed the fence should be on the boundary line. When asked about the maintenance of the ditch line, Halsey said he had witnessed the Cothams cleaning the gully on a few occasions and also witnessed tree trimmers topping the trees in the line.

James Cotham testified that he has owned his property in Distillery Road since 1983. Mr. Cotham said he always believed he owned to the gully but by deed owned even farther north. However, Mr. Cotham said he was not particularly concerned about the property north of the gully.

Mr. Cotham recalled the old fence he removed from the gully. He explained that the old fence was located on the southern border of the ditch, running down through the ditch. The fence occasionally connected to a tree in the line. He recalled Mr. Halsey telling him he should not remove the fence. During the Cothams' ownership, he could not recall ever being excluded from the property by Mr. Dowdell. The only exception was when Mr. Dowdell called the sheriff when they went onto the disputed area after the Burns' survey. Likewise, Mr. Cotham said Mr. Dowdell never tried to use the property in such a way that Mr. Cotham thought he should exclude Mr. Dowdell. Mr. Cotham described the periodic cleanup he and his wife performed on the subject area.

Mr. Cotham discussed the placement of the signs in the corner of his yard. He said the sign was placed to protect his property after the stake from the Burns survey was placed against his fence. He said the purpose of the sign was to protect his property and to inform others that his property was not for sale. Mr. Cotham agreed that the center of the ditch line would be a good resolution to the disputed boundary line.

In its finding, the trial court concluded first that the plaintiff failed to establish a prima facie case of defamation of title. The court noted that the signs placed in the defendant's yard, which served as the primary basis for this claim, were nothing more than a notice of lis pendens to alert others that there was a disputed property line. Secondly, the trial court found the defendants/counterplaintiffs had failed to prove adverse possession. The court found no proof to support the requisite elements of actual exclusive and continuous possession of this portion of the property in dispute. In fact, the court concluded there was no proof by either party to support a claim by either of adverse possession. As to the final issue of the location of the property line, the trial court weighed the testimony and noted the discrepancies in the surveyor's testimony and that of the lay witnesses. The court concluded that the gully is the natural boundary between these two parcels and that the center of the gully shall become the boundary line between the two parcels. The court advised the parties that a surveyor would be commissioned to survey the center line and that the surveyed center line would be the decree of the court as the boundary.

Mr. Dowdell claims the trial court erred (1) in declining to grant Dowdell's summary judgment motion; (2) in denying Dowdell's oral motion at the beginning of trial to deem the defamation of title claim admitted due to the Cothams' failure to timely file a response to the amended complaint; (3) in disregarding Dowdell's survey conducted by a registered land surveyor in the absence of a competing survey; (4) in finding that the necessary elements of defamation of title had not been proven; and (5) when it arbitrarily reset the boundary line between Dowdell's property and the Cothams' property at the centerline of the gully. Mr. Dowdell finally claims that the trial court's order cannot be carried out due to the inability of the Cothams to obtain a survey due to a faulty legal description.

DISCUSSION

I. Summary Judgment Motion

In his first issue, Mr. Dowdell claims the trial court erred when it failed to grant his motion for summary judgment on the issue of quieting title. The standard utilized by this Court when reviewing a trial court's granting of summary judgment is as follows:

The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. See Staples v. CBL & Assoc., Inc., 15 S.W.3d 83, 88 (Tenn. 2000); Hunter v. Brown, 955 S.W.2d 49, 50-51 (Tenn. 1997); Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. Staples, 15 S.W.3d at 88.

Blair v. West Town Mall, 130 S.W.3d 761, 762-64 (Tenn. 2004).

When a motion for summary judgment is made pursuant to Tennessee Rule of Civil Procedure 56, and supported as provided in Rule 56, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06.

When the party seeking summary judgment makes a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. Staples v. CBL & Assoc., Inc., 15 S.W. 3d 83 (Tenn. 2000). To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim. Staples, 15 S.W.3d at 88-89.

In the instant case, the appellant Dowdell moved for summary judgment on the issue of quieting title. In his motion he asserted his ownership in the subject property as evidenced by the legal description contained in his deed recorded in Robertson County. This deed, he claimed,

put the world on notice of the location of the boundaries of the property. He bolstered this claim by including a survey performed by a registered land surveyor.

In their response, the Cothams answered the concise statement of material facts by disagreeing with many of the facts asserted by Mr. Dowdell as undisputed. In addition, the Cothams filed the affidavit of Ammon Hulsey and certified copies of their deeds. Among the factors cited by the Cothams were the calls in their deed for just over 900 feet of road frontage and the existence of the old fence, remnants of which remained on various trees.

Mr. Dowdell argues that the Cothams rested on mere allegations and did not present evidence to contradict the results of the survey. Citing Johnson v. City of Mt. Pleasant, 713 S.W.2d 659, 662 (Tenn. App. 1985), Mr. Dowdell argues Tennessee law clearly favors a party who has obtained a valid survey in a boundary line dispute. In Johnson, the plaintiffs obtained a survey to support their position as to the location of the boundary line with the City. The City did not submit its own survey but argued there was sufficient additional evidence relating to the location of the boundary line that reasonable minds could differ as to the location of the boundary line. Id. at 662. In response, the City cited, among other things, as evidence of the location of the boundary line, the lack of knowledge of the plaintiffs' predecessor in title as to the location of the boundary line, the reference in plaintiffs' deed as to the boundary noting "bounded by the City," the testimony of a waste water plant employee since 1959 who testified of the existence of a tree line until 1970, and the City's warranty deed and deeds of their predecessors. Id.

The Johnson court addressed each of the City's claims of "other evidence" contrary to the surveyor's findings. The court found none of these categories constituted the evidence required to challenge the surveyor's testimony. It found the only evidence that identified the boundary line came from the surveyor without material evidence from the City to contradict the surveyor. Therefore, it concluded the trial court should have granted plaintiff's motion for directed verdict. Id. at 662-63.

However, we find Johnson is distinguishable from the instant case. While here, as in Johnson, the opposing party (Cothams) failed to obtain their own survey, the balance of the evidence in the present case was more significant than in Johnson. None of the "other evidence" in Johnson gave any indication as to where the original boundary line fell. We concede here that neither property owner knew the precise location of the boundary in this case though residing next to each other for over twenty years. Some "over-the-fence" discussions through the years cast doubt on the location of the actual line (i.e. Mrs. Cothams' comments that their line went to the ditch or even farther toward Mr. Dowdell's driveway); however, neither knew the boundary location with any certainty.

We also acknowledge that the mere existence of a recorded deed does not, in and of itself, give us conclusive evidence of a properties' boundaries. However, for the purposes of summary judgment, we note the following proof created a genuine dispute as to material facts in the instant case. Ammon Hulsey, whose affidavit was submitted in response to Mr. Dowdell's motion for summary judgment and who was a prior owner in the Cothams' chain of title,

indicated the existence of an old fence between the two properties in the ditch line. This fence was shown to him as the boundary line between his property at the time (now owned by the Cothams) and the property now belonging to Mr. Dowdell. The fence existed for many years until it was removed by the Cothams to protect their cattle. This evidence certainly created a genuine issue as to the boundary line location. Further, Mrs. Cothams' statement regarding her conversation with a member of Mr. Dowdell's surveyor's team about the road frontage cast some doubt on the surveyor's actual findings.

These facts combined clearly establish a genuine issue of material fact in the instant case. The trial court properly denied Mr. Dowdell's summary judgment motion. This claim is without merit.

II. Response to Amended Complaint

In his next issue, Mr. Dowdell claims the trial court erred when it permitted the Cothams to file a response to the amended complaint during a lunch break after the bench trial had begun. Following the commencement of the original action, Mr. Dowdell filed an amended complaint to add the tort of defamation of title. Having not received a response to the amended complaint by the morning of trial, Mr. Dowdell orally moved to deem the allegation of defamation of title admitted due to the Cothams' failure to file a response. Upon the oral motion, the trial court instructed the Cothams to file a response to the amended complaint at the lunch break. According to the record, the Cothams complied with the court's directive.

Although the trial court appears to have cited "Rule 15C" in error, even Mr. Dowdell acknowledges the rules of procedure permit the courts and litigants to conduct their business with an orderly procedure for preparation and disposition of disputes. However, he claims the trial court's decision to allow the amendment mid-way through the trial placed him at a substantial disadvantage.

This Court recognizes that amendments to pleadings and responses to those pleadings work most effectively when addressed prior to the trial. However, the rules do contemplate liberal amendments to pleadings, for example, throughout the course of a proceeding even to the start of the trial depending on the facts and circumstances and perhaps late acquired discovery. Here, Mr. Dowdell's complaint deals with the Cothams' failure to timely file a response to the amended complaint. It is the late-filed response that Mr. Dowdell claims put him at a substantial disadvantage or the Cothams at a substantial advantage.

First, it does not appear Mr. Dowdell moved prior to trial for default due to the Cothams' failure to file a response to the amended complaint. See Smith v. Smith, 643 S.W.2d 320, 343 (Tenn. 1982). Of course, the Court notes that the Cothams similarly did not move for an enlargement of time within which to file their response. Secondly, once the Cothams' response was filed during the trial, there is no indication in the record (other than objection to the timeliness of the filing) that Mr. Dowdell moved for a continuance or otherwise put on the record how he was put at a disadvantage based on the late-filed response.

Viewing the record as a whole in light of these actions or inactions, with special attention to the late-filed pleading, we cannot find that the trial court erred when it permitted the Cothams to file their response during the proceedings. Accordingly, this claim is without merit.

III. Failure to Adopt Plaintiff's Survey

Next, Mr. Dowdell argues the trial court erred when it disregarded the survey performed by a registered land surveyor in the absence of a competing survey and/or contradictory expert testimony. Citing to his argument relating to the summary judgment issue, Mr. Dowdell essentially adopts the same argument but concludes the trial court should have determined at trial that the boundaries of the Dowdell's property were as stated on the survey performed by Burns.

Mr. Dowdell cites no authority to support his proposition that the law absolutely requires a competing land survey in every boundary line dispute or that the trial court must adopt the sole surveyor's findings as a matter of law. Similarly, he cites no authority to support his claim that the trial court was required to disregard the testimony presented by the Cothams because the testimony was from lay witnesses rather than expert witnesses. This claim is simply without merit.

In the remaining issues, Mr. Dowdell challenges the factual and legal findings made by the trial court following the bench trial. Tennessee Rule of Appellate Procedure 13(d) provides that "review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). See also Hass v. Knighton, 676 S.W.2d 554, 555 (Tenn. 1984). Under this standard, a determination by the trial court regarding the credibility of witnesses and a conflict in testimony is "binding on the appellate court unless from other real evidence the appellate court is compelled to conclude to the contrary." Hudson v. Capps, 651 S.W.2d 243, 246 (Tenn. App. 1983). Therefore, against this backdrop we review Mr. Dowdell's final two issues.

IV. Prima Facie Case - Defamation of Title

In this issue, Mr. Dowdell maintains that, even if the trial court properly permitted the Cothams to late file their answer to the amended complaint, the trial court nonetheless erroneously concluded that Mr. Dowdell failed to prove the necessary elements of defamation of title. In his amended complaint, Mr. Dowdell added the allegation of defamation of title.

Citing Ezell v. Graves, 807 S.W.2d 700, 701 (Tenn. App. 1990) as cited in a later unpublished opinion of this Court, Desgranges v. Meyer, 2004 WL 1056603 (Tenn. App. 2004), Mr. Dowdell first argues the existence of such a cause of action in Tennessee. Based on this authority, the elements of the tort of defamation of title are as follows: (1) the [plaintiff] has an interest in the property; (2) the defendant published false statements about the title to plaintiff's

property; (3) the defendant acted maliciously; and (4) the false statements proximately caused the plaintiff a pecuniary loss.

As with any tort, the plaintiff must establish a prima facie case before he is entitled to any form of relief. The testimony at the bench trial, along with the discovery contained in the record, revealed that Dowdell and the Cothams are adjoining property owners. Mr. Dowdell here presented his deed to verify his interest in this real property. Therefore, he has established the first element. However, evidence to support the remaining three elements is scant, if present at all.

Both Mr. and Mrs. Cotham admitted they placed the signs at the corner of their property. However, even if we viewed the contents of the signs in a light favorable to Mr. Dowdell, it is difficult to conclude that the statements were “false” as required in the second element. The signs accurately indicated there was a property or boundary line dispute. Similarly the statements that the property owners only want what is theirs or that their deed shows a certain road frontage cannot be said to be false. The Cothams honestly believed they owned the road frontage in question per their deed. The only questionable remark at all in this case related to attempts to resolve the dispute. The testimony revealed that the parties talked about finding the exact location of the boundary; however, we know little else about any settlement efforts. This element simply has not been established.

Even if we assume the Cothams posted a false statement, the proof does not establish that the Cothams made the statements maliciously. The trial court concluded that the signs were not done maliciously but instead essentially constituted a lis pendens notice. Because the proof did not establish a prima facie case of defamation of title, the trial court properly denied the claim. Therefore, plaintiff’s additional requests for attorney fees or costs are similarly without merit.

V. Arbitrary Boundary Line

Mr. Dowdell’s next issue goes to the heart of this action to quiet title and underlying boundary line dispute. He insists the trial court committed error by arbitrarily setting the boundary line between Dowdell’s and the Cothams’ property at the center of the drainage ditch without sufficient evidence as to the location of said drainage ditch.

At trial, the court heard testimony from a registered surveyor (who conducted a survey of Dowdell’s property), Mr. Dowdell, the Cothams and a prior landowner in the Cothams’ chain of title. Both parties acknowledged they never really knew the exact location of their common boundary. “Over-the-fence” conversations through the years indicated the Cothams had told Mr. Dowdell their line possibly went to Dowdell’s driveway but certainly at least went to the ditch line. The surveyor testified that he found two markers on Mr. Dowdell’s property and a third at the corner of the property of Dowdell and the neighbor to the north. The surveyor’s testimony confirmed the unknown closing point or boundary line.

The surveyor pulled deeds in the chain of title to reconstruct the larger parcel from which the eventual multiple tracts were derived. He said he found a point on Mr. Dowdell's property and shot a line across the road into the property across the road which had one time many years ago been one parcel. Based on this line, the surveyor placed his marker at the corner of the Cothams' property.

This surveyor's mark was likely the spark that ignited this dispute. When the marker was placed near the Cothams' fence, the Cothams challenged the finding saying they had always owned at least to the ditch line and perhaps past the ditch line to the north. Again, Mr. Dowdell said he was never shown the boundary line and never really knew the location of the common boundary.

In addition to the parties and a surveyor, the Cothams presented the testimony of a prior land owner in their chain of title. Ammon Hulsey testified that he previously owned the land now owned by the Cothams. Hulsey said he had lived in the neighborhood for 60 years and was deeded what is now the Cothams' property from the Lewis Elmore family who essentially "raised his wife." This previous grantor, Elmore, conveyed half (southern portion) of a larger tract to Mr. Hulsey and the other half (northern portion) to another party who was in Mr. Dowdell's chain of title. At the time of this conveyance, Hulsey said Elmore walked him over the property and showed him the intended boundaries. According to Hulsey, the boundary was the ditch line between the two properties. Hulsey explained that an old fence ran down the center of the ditch line and had served as the boundary line for years. Hulsey also testified that he observed the Cothams removing the old fence and told them they should have left the fence as it reflected the long held boundary line. Even though the fence has been removed, remnants of it remain on trees in or near the ditch line.

Based on the testimony as a whole, the trial court weighed the evidence, adjudging the credibility of the witnesses. We find no cause for concern that the trial court found the testimony of the surveyor troublesome. The surveyor testified as to his results but noted that he had not conducted the actual survey. The court found that the surveyor's testimony left some questions unanswered. For example, he did not know if anyone from his staff walked the disputed road frontage as alleged by the Cothams. Mrs. Cotham testified that she was present when the survey was conducted and approached the surveyor's staff. She asked one of the surveying team about the road frontage on the Cotham deed to which (according to Mrs. Cotham who testified without objection) he responded that there appeared to be a fifty feet overlap. The trial court found this acknowledgment to be significant because it was within a reasonable range of the road frontage shown on the surveyor drawings offered as exhibits.

Assessing the credibility of the witnesses, the trial court found the testimony of Mr. Hulsey to be significant as to the location of the boundary line between Dowdell's and the Cothams' property. Viewing this testimony in light of the conflicting testimony of the surveyor and Mrs. Cotham, the court concluded the ditch line was the natural and existing boundary between the properties.

Even though Mr. Dowdell insisted the trial court should have given greater weight to the testimony of a surveyor, such a proposition is simply not supported by our case law. It is well settled that the testimony of an expert is to be considered along with all other testimony and such testimony does not carry any type of presumption favoring it over another type of evidence. Having made the credibility determinations, the trial court was within its purview to disregard some or all of the witnesses' testimony. As noted above, this credibility finding is "binding on the appellate court unless from other real evidence the appellate court is compelled to conclude to the contrary." We find no other real evidence from which to conclude the contrary.

Therefore, we find the trial court did not arbitrarily conclude that the boundary line was the natural boundary between the parties' properties. The court's ruling was based on the evidence and was supported by the testimony of prior land owner, Hulsey. That the trial court gave more credence to Hulsey's testimony does not warrant a reversal of the trial court's final ruling. This claim is without merit.

VI. Inability to Carry Out Court-Ordered Remedy

In his final issue, Mr. Dowdell insists that the trial court's order, even if proper, cannot be implemented because the Cothams cannot obtain a survey to their property due to a faulty legal description. We disagree.

Once the trial court concluded that the ditch line or gully would serve as the natural boundary line between the two parties, the court ordered the boundary to be surveyed with this new survey line becoming part of the court's decree. The court invited the parties to use the surveyor who conducted the survey of Mr. Dowdell's property due to his familiarity with the property but informed them they could mutually agree on a surveyor of their choice. If the parties were unable to agree, the court would name a surveyor.

Mr. Dowdell claims this remedy is impossible and cannot be carried out. He complains that the only valid method to accomplish this relief is to have both properties re-surveyed to incorporate the established boundary line. Based on testimony at the trial, it appears the Cothams' deed poses problems for surveyors due to the method used to compute the acreage, etc. Due to this "bust" in the deed, Mr. Dowdell argues the Cothams' property cannot be re-surveyed.

We do not agree that the court's ruling contemplates complete surveys of both properties or either property. The court merely entered an order establishing the boundary between the two properties. Therefore, the court was unconcerned with every other boundary of the properties. Instead, the court in essence found the new surveyed boundary line would resolve the issue. We must agree.

The sole disputed area is the boundary line. Following a bench trial, the court established the boundary. A surveyor can complete a survey including the calls for the center of the ditch line as ordered. The resulting description for the center of the ditch line can be included in the

court's decree as the proper boundary line. Recording of this decree in the Register of Deeds office will put all on notice of the boundary line between these parties. This issue is without merit. We affirm the court's finding.

CONCLUSION

For the reasons set out above, we affirm the judgment of the trial court and remand for further proceedings consistent with this opinion.

J. S. DANIEL, SENIOR JUDGE